REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

[MILIMANI LAW COURTS]

THE CIVIL APPELLATE DIVISION

CIVIL APPEAL CASE NO. E353 OF 2021

CELESTIN NTARWANDA………………………………………… APPELLANT

VERSUS

COMMISSIONER FOR REFUGEE AFFAIRS………… ……..RESPONDENT

(Being an Appeal from the Decision of the Refugee Appeal Board (Wangari Mwanza, Kanairo Miriti, Patrick Owambo, Moses Nkuya & Dr. Abdirizak Nunow) in RAB/845 – 14C00058/2018 (AC 2)

JUDGMENT

1. The Appellant fled from Rwanda in 1994 following the Genocide that resulted in the loss of lives in Rwanda.
2. The Appellant applied for refugee status and he was issued with a refugee card on 28th July 2008.
3. On 21/4/2015, an indictment was received from the Republic of Rwanda in which the prosecution of the Republic of Rwanda charged the Appellant with Genocide, incitement to commit Genocide and Extermination of crimes against humanity.
4. On 2nd November 2017, the Appellant's case was referred to the Refugee Status Department and the matter was brought to the attention of the Commissioner of Refugee Affairs.
5. On 5/10/2017, the Appellant was invited for an interview in line with the procedure provided under the Refugee (Registration and adjudication) Regulations 2009 which was to enable the

ORIGINAL

Commissioner to verify the veracity of the allegations raised. The Commissioner withdrew the Appellant's refugee status.

6. The Commissioner for Refugee Affairs informed the Appellant of its decision to withdraw his refugee status under Section 20(1) of (a) of the Refugee Act 2006 for reasons that the Appellant had made misrepresentation and concealment of facts that were material to the Refugee status determination.

7. On 31/5/2021, the Refugee Appeal Board (RAB) affirmed the decision of the Commissioner for Refugee Affairs to withdraw the Appellants Refugee status and dismissed the amended appeal dated 5/12/2018 after taking viva voce evidence.

8. The Appellant has appealed to this Court against the dismissal of his appeal on the following grounds:-

(i) The Honourable members of the Board erred in law and in fact in misconstruing, misinterpreting and misapplying Section 4 of the Refugee Act, 2006; and thus arrived at an erroneous decision.

(ii) The Honourable members of the Board erred in law and in fact in concluding that it was not a must for the offences/acts stipulated in Section 2 of the Refugee Act to be shown to have been committed by an asylum seeker for the Exclusion Clauses to take effect.

(iii) The Honourable members of the Board erred in law and in fact in disregarding clear municipal (Kenyan) law on refugees in favour of international law/practice in violation of Article 2 of the Constitution of Kenya, 2010, the complementary nature of international law and binding decisions on the relationship between municipal and international law.

(iv) The Honourable members of the Board erred in law and in fact in affirming the Respondent's decision (dated 13th November 2017) to withdraw/cancel the Appellant's refugee status notwithstanding the irregularities that were manifest in the process by which it was arrived at.

(v) The Honourable members of the Board erred in law and in fact in finding that the Appellant misrepresented/concealed facts on the basis of his being mentioned, by parties and witnesses, in

ORIGINAL

'Reports from the International Criminal Tribunal for Rwanda (ICTR); when in fact, none of these 'reports' was inculpatory to the Appellant.

(vi) The Honourable members of the Board erred in law and in fact in adopting a burden of proof that fell below the threshold set out in Section 4 of the Refugee Act, subjected the Appellant to an unfair trail, and thus arrived at an erroneous, unfair and unjust decision.

(vii) The Honourable members of the Board erred in law and in fact in failing to give the Appellant the benefit of doubt; in violation of humanitarian law best practice.

(viii) The Honourable members of the Board erred in law and in fact in failing to acknowledge that owing to the fact that they were interviewing the Appellant on matters that took place several decades ago, there were bound to be challenges in recollecting and in giving specifics.

(ix) The Honourable members of the Board erred in law and in fact in rejecting the Appellant's credible testimony and supposing, by surmise and conjecture, that the Appellant may be liable for crimes against humanity/genocide – as detailed in the Rwanda indictment dated 22nd April 2015.

(x) The Honourable members of the Board erred in law and in failing to caution themselves of the contents of the Rwandan indictment, in light of the fact that Rwanda was the same state from which the Appellant was seeking refugee protection and humanitarian aid.

(xi) The Honourable members of the Board erred in law and in fact in failing to take into account the prejudicial nature of the Rwandan indictment; and thus, in conducting its interview on its contents, violated the Appellant's non-derogable right to fair Hearing/process

(xii) as guaranteed by Articles 47 & 50 of the Constitution of Kenya, 2010.

(xiii) The Honourable members of the Board erred in law and in fact in finding the Appellant guilty of concealing relevant information while there were no records, either before the Respondent or the Board, of the Appellant's 1st Instant interviews.

(xiv) The Honourable members of the Board erred in law and in fact in disregarding/dismissing the Appellant's direct/oral testimony in favour of news articles, witness testimonies in other cases and

ORIGINAL

other 'country of origin information'. In so doing, the Board violated the Appellant's right to fair hearing.

(xv) *In relying on undisclosed country of origin information and other materials; materials which the Appellant could not challenge in evidence, the Board irretrievably erred in law and fact and violated the Appellant's non-derogable right to call and challenge evidence, as guaranteed by Article 50 (2) (k) of the Constitution of Kenya, 2010.*

(xvi) *The Honourable members of the Board erred in law and in fact in conflating Cancellation of Refugee Status with Withdrawal of refugee Status and thus subjecting the Appellant's cause to a wrong standard of review; with the end result of arriving at a wrong conclusion.*

(xvii) *The Honourable members of the Board erred in law and in fact in cherry-picking portions of the Appellant's testimony which I perceived to be contradictory, instead of considering his testimony as a whole.*

(xviii) *The Honourable members of the Board erred in law and in fact in supposing, without any evidence, that the Appellant left the Ruhengeri Court of Appeal because 'he knew that an attack was about to be carried out at the Court of Appeal'.*

(xix) *The Honourable members of the Board violated the Appellant's right to fair hearing, as guaranteed by Article 50 (2) (k) of the Constitution of Kenya, 2010, in concluding, without any evidence, that the Appellant left the Ruhengeri Court of Appeal because 'he knew that an attack was about to be carried out at the Court of Appeal.*

(xx) *The Honourable members of the Board erred in law and in fact in using the Appellant's admitted efforts of humanitarian assistant, to tutsi persons/families in his care, and his survival thereafter, against him, on the basis that 'it was well known that at the time of the genocide, moderate Hutu who were also termed as tutsi sympathisers and officials who refused to participate in the genocide were being killed mercilessly'.*

(xxi) *In discrediting the Appellant's testimony on the basis of his survival and their perceived views on what happened to 'moderate hutu' tutsi sympathisers', the Honourable members of the Board went beyond the scope of their Appellate role, made findings that are unsupported in evidence, and manifestly erred and subjected the Appellant to an unfair trial/hearing.*

ORIGINAL

(xxii) *The Honourable members of the Board erred in law and in fact in relying on the alleged conviction of one Dismas Nzanana for participation in genocide at the Ruhengeri Court of Appeal, to discredit the Appellant's account.*

(xxiii) *The Honourable members of the Board erred in law and in fact in holding at page 26 of their decision, that additionally, the Board cast doubt in the fact that the Appellant, a high ranking official chaired a meeting where he claims to have had no knowledge that his entire team in attendance was planning a massacre. This finding is neither supported by evidence, not the 'country of origin information' cited by the Board. It is premised on surmise and conjecture, and its reliance was gravely prejudicial to the Appellant.*

(xxiv) *The Honourable members of the Board erred in law and in fact, in holding, at page 28 of their decision, that this begs the question whether the Appellant was ignorant of the undertakings of his colleague (Dismas Nzanana) or he knew but chose to mislead the Respondent and this Board, there being no evidence of any misleading or complicity in the alleged actions of Dismas Nzanana.*

(xxv) *The Honourable members of the Board erred in law and in fact in holding that the Appellant's testimony contradicted generally known facts about the incidences he was interviewed on.*

(xxvi) *The Honourable members of the Board erred in law and in fact in holding that 'there is sufficient circumstantial evidence to indicate that the Appellant either knew or had reason to know of the occurrences at the time' notwithstanding their own appreciation that the Appellant 'was not mentioned in the country of origin information from the Rwandan National Commission on the Fight against Genocide.*

(xxvii) *The Honourable members of the Board erred in law and in fact in relying on what they termed as 'circumstantial evidence' to impute the Appellant's participation (or knowledge thereto) in crimes against humanity/genocide, crimes upon which the Appellant had a presumption of innocence, crimes which had to be proven beyond reasonable doubt.*

(xxviii) *The Honourable members of the Board erred in law and in fact in relying on uncorroborated 'circumstantial evidence'.*

(xxix) *The Honourable members of the Board erred in law and in fact in delivering a decision by 5 of its members (Wangari Mwnzia, Kanario Miriti, Patrick Owambo, Moses Nkuya and Dr. Abdirizak*

ORIGINAL

Nunow); whereas only 3 of the members (Wangari Mwanzia, Dr. Abdirizak Nunow & Patrick Owambo) had been constituted as the Interview/Appeal Panel, and only 3 of the members were present during the hearing of the Appeal.

(xxx) In delivering a decision over a matter which they had neither heard nor been part of the panel presiding over the matter, the Honourable members of the Board – Moses Nkuya & Kanario Miriti irretrievably erred in law and fact, to the detriment of the Appellant as he had no chance of presenting his testimony to them before they made their decisions; in violation of the Appellant's 'access to justice' and 'fair trial' rights – as guaranteed by Articles 48 and 50 of the Constitution of Kenya, 2010.

9. The parties filed written submissions as follows: the appellant submitted that the operative statute for purposes of this Appeal is the Refugees Act, No. 13 of 2006; and NOT the Refugees Act, 2021; the prior statute having been in force when the Refugee Status Determination (RSD) Appeal was lodged at the Refugee Appeals Board (RAB) in 2018.

10. The Appellant fled from Rwanda in 1994 following the genocide that resulted in the loss of lives and property. His flight brought him to Kenyan soil in/about 1996.

11. He made an asylum application and was issued with an asylum seeker identity card (refugee ID) on/about 28/7/2008.

12. On 13/11/2017, the Respondent informed the Appellant of its decision to withdraw the Appellant's refugee status. This decision prompted the Appellant's RSD (Amended) Appeal Statement dated 5/12/2018.

13. The RAB heard the Appeal viva voce, and 'cross-examined' the Appellant on both his claim for refugee status, and the claim to reverse the decision of the Respondent.

ORIGINAL

14. By a decision dated 31/5/2021, the RAB dismissed the Appeal and confirmed the decision of the Commissioner of Refugee Affairs to revoke the Appellant's refugee Status.

15. The appellant submitted further that section 4 of the Refugee Act, 2006 provides that

"A person shall not be a refugee for the purposes of this Act if such person-

a. has committed a crime against peace, a war crime, or a crime against humanity as defined in any international instrument to which Kenya is a party and which has been drawn up to make provision in respect of such crimes;

b. has committed a serious non-political crime outside Kenya prior to the person's arrival and admission to Kenya as a refugee;

c. has committed a serious non-political crime inside Kenya after the persons arrival and admission into Kenya as a refugee;

d. has been guilty of acts contrary to the purposes and principles of the United Nations or the African Union; or

e. having more than one nationality, had not availed himself of the protection of one of the countries of which the person is a national and has no valid reason, based on well-founded fear of persecution.

16. The appellant argued that from the above provision persons who have committed crimes or have been found guilty of acts contrary to the purpose of the UN or AU are not eligible for refugee protection.

ORIGINAL

17. The appellant pointed out that at no point was it established by the respondent, that he had committed any crimes or acts listed under section 4 above.
18. In affirming the respondent's decision based on an indictment the RAB erred and subjected the appellant to an erroneous legal standard that appeared to be premised on the language adopted by the Refugee Act 2021 that reads;

"A person shall be excluded from being considered for refugee status if there exists serious reasons to believe that the person-

a. Has committed a crime against peace, a war crime or a crime against humanity referred to in any international instrument to which Kenya is a party.

b. Has committed a serious non-political crime against Kenya prior to his or her admission to Kenya as a refugee

c. Has been guilty of acts contrary to the purposes and principles of the United Nations and the African union; or

d. Is determined to be a threat to national security."

19. The appellant submitted that the *"Benefit of Doubt Principle"* has been posited in customary International Law as the guiding principle in credibility assessment.
20. The principle dictates that an applicant will be given the benefit of doubt on matters that may not add up in his refugee claim. The appellant contended that although the appellant bore the burden of proving his asylum claim the respondent bore the burden of proving that the cancellation of refugee status was in order.
21. The respondent failed to do not just because of the misinterpretation of section 4 of the Refugee Act 2006 but also on account of the absence of evidence in support of the exclusion grounds.

ORIGINAL

22. The respondent on their part submitted that the 1951 Refugee Convention and its 1967 Protocol provide the internationally recognized definition of a refugee and outline the legal rights they are entitled to. Article 1(F) of the 1951 Refugee Convention provides for the procedure of cancellation and withdrawal of refugee status.

> **F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;**
>
> **(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;**
>
> **(c) he has been guilty of acts contrary to the purposes and principles of the United Nations**

23. The UNHCR, is the UN Refugee Agency. UNHCR provides grounds for commencing cancellation procedures if there is a good reason to believe that recognition may have been granted erroneously as a result of one or more of the following factors:

"Misrepresentation or concealment by the individual concerned or third party of facts that were material to the RSD determination with or without fraudulent intent.

24. Withdrawal of Refugee Status letter dated 13th November 2017 (page 76) was addressed to Celestin Ntarwanda for withdrawal of refugee status based the following grounds:

i) lack of credibility on material elements of the applicants claim;...

ORIGINAL

1. Events occurring on or about 19 April 1994 where 300 Tutsi were killed at the Court of Appeal Hall…..

2. The movement of 10 Tutsi survivors of the Court of Appeal Hall killings from Ruhengeri hospital.

ii) Rejection based on an analysis of the grounds under section 20(1)(g)(a) of the Act. "in your case it has been decided that your refugee recognition was granted erroneously as a result of misrepresentation and concealment by you of facts that were material to the refugee status determination. As a result, your recognition as a refugee is withdrawn."

25. Regulation 37(1) of the Refugees (Reception, Registration and Adjudication) Regulations 2009

(I)The Commissioner may withdraw the refugee status of a refugee if there is evidence that:-

(a) at the time of his refugee status determination interview the asylum seeker, was disqualified under section 4 of the Act;

(b)' the refugee committed a serious non political crime in Kenya after his arrival and admission to Kenya as a refugee; or '

(c) the recognition may have been granted' erroneously as a result of, misrepresentation or concealment of facts that were material to 'the refugee status determination.

26. The respondent submitted that the appellant had misrepresented and concealed material facts which directly influenced the erroneous granting of refugee status. The Respondent's discovery of an indictment and international arrest warrant against the Appellant further supports the conclusion that his application was

ORIGINAL

based on misrepresentation. Therefore, the withdrawal of his refugee status was justified under Regulation 37(1)(c) of the Refugees (Reception, Registration and Adjudication) Regulations, 2009.

27. The respondent on whether the appellant was afforded a fair trial submitted that the obligation to provide access to fair and efficient procedures for the determination of refugee status flows from the right to seek asylum under Article 14 of the 1948 Universal Declaration of Human Rights and, for States Parties to the 1951 Convention and its 1967 Protocol, from their obligation to fulfil their treaty obligations in good faith.
28. The board's reliance on section 4 of the Refugees Act was not irrational and neither was it illegal. Neither the Refugee Act nor the regulations provide for the standard required under section 4(a). However, as refugee law is highly governed by international law, it was imperative for the Board to take a wholesome approach to the interpretation given to the section.
29. The respondent submitted that the Refugee Status Determination (RSD) is the process under which a refugee undergoes to determine whether they fall under the exclusion clauses or not. Therefore, it is after the RSD that the Board will consider the facts of the case in accordance with guidance of Article 1F and decide whether there are reasons for considering that the applicant has committed a crime or act contrary to Article 1F, then if so asylum must be refused.
30. The appellant was accorded a fair hearing. The appellant was duly notified of the proceedings, given an opportunity to present his case before the Refugee Appeal Board, and had access to a statutory right of appeal as provided under Section 10(3) of the Refugee Act. The procedure aligns with the principles of

ORIGINAL

procedural fairness, and the decision to confirm the Commissioner’s determination was within the Board’s mandate.

31. The respondent submitted that there was credibility in the appellants information because the appellant, a Hutu who was a sous prefet of Ruhengeri Province was affiliated with the National Revolutionary Movement for Development between 1985 and 1994.
32. He was adamant that he was not aware of the meeting called on 5/4/1994 by Bourgmestre of Muking Province Juvenal Kajeleli asking Tutsi to be exterminated. However, the board rightfully found that his explanation was not reasonable because of inconsistencies in his testimonies and interviews.
33. This triggered the cancellation of his refugee status because of the deliberate misrepresentation or through the application of the exclusion clauses under Article 1 F.
34. The respondent however noted that requests for extradition will often trigger cancellation considerations however extradition requests in and of themselves should not be the only ground for cancellation. In the matter herein however the investigation by the International Criminal Tribunal of Rwanda were found to be valid grounds for cancellation of refugee status.
35. **The issues for determination in this appeal are as follows:**
    (i) Whether the Refugee Appeal Board erred in law and fact in its interpretation and application of Section 4 of the Refugee Act, 2006, concerning the exclusion clauses.
    (ii) Whether the decision to withdraw the Appellant's refugee status was based on a fair process and supported by sufficient, credible evidence, particularly in light of the allegations of

ORIGINAL

misrepresentation and the reliance on an indictment from Rwanda.

(iii) Whether the composition and conduct of the Refugee Appeal Board's proceedings violated the Appellant's right to a fair hearing as guaranteed under the Constitution of Kenya, 2010.

36. This appeal originates from the decision of the Refugee Appeal Board which affirmed the Commissioner for Refugee Affairs' withdrawal of the Appellant's refugee status.

37. The Appellant, a Rwandese national who fled from Rwanda in 1994 and was recognized as a refugee in Kenya in 2008, had his status withdrawn following an indictment from the Republic of Rwanda alleging his involvement in genocide and crimes against humanity.

38. The central premise for the withdrawal was that the Appellant's refugee status was granted erroneously due to misrepresentation and concealment of material facts, pursuant to Section 20(1) of the Refugee Act and Regulation 37(1)(c) of the Refugee Regulations, 2009.

39. On the first issue regarding the interpretation of Section 4 of the Refugee Act, 2006, the Court finds that the Board fell into error. The Appellant correctly contends that the operative law at the time of his status determination and the initial appeal was the Refugee Act, 2006.

40. Section 4 of this Act is unequivocal in its phrasing: **"A person shall not be a refugee... if such person has committed..."** the listed international crimes. This language imposes a high threshold, requiring a finding that the person has, in fact, committed the crimes.

41. The said Section 4 of the Refugee Act, 2006 provides as follows;

ORIGINAL

“A person shall not be a refugee for the purposes of this Act if such person-

(a) has committed a crime against peace, a war crime, or a crime against humanity as defined in any international instrument to which Kenya is a party and which has been drawn up to make provision in respect of such crimes;

(b) has committed a serious non-political crime outside Kenya prior to the person’s arrival and admission to Kenya as a refugee;

(c) has committed a serious non-political crime inside Kenya after the persons arrival and admission into Kenya as a refugee;

(d) has been guilty of acts contrary to the purposes and principles of the United Nations or the African Union; or

(e) having more than one nationality, had not availed himself of the protection of one of the countries of which the person is a national and has no valid reason, based on well-founded fear of persecution.

42. The Board, however, appears to have applied the lower standard from the 2021 Act or international instruments like Article 1F of the 1951 Convention, which employs the phrase **"serious reasons for considering."**

43. The Refugee Act 2021 that reads;

“A person shall be excluded from being considered for refugee status if there exists serious reasons to believe that the person-

ORIGINAL

a.Has committed a crime against peace, a war crime or a crime against humanity referred to in any international instrument to which Kenya is a party.

b. Has committed a serious non-political crime against Kenya prior to his or her admission to Kenya as a refugee

c. Has been guilty of acts contrary to the purposes and principles of the United Nations and the African union; or

d. Is determined to be a threat to national security."

44. The 2006 Act did not incorporate the **"serious reasons for considering"** standard. Consequently, the Respondent and the Board were required to establish that the Appellant had actually committed the crimes, a standard which aligns with the principle that exclusion from refugee protection is a grave measure.
45. The Board's failure to apply the correct standard of Section 4 of the 2006 Act was a fundamental misdirection in law.
46. Based on the principle against retroactivity, the Refugee Act of 2021 cannot be applied to the Appellant's case.
47. The law in force at the time of his refugee status determination in 2008/2009 was the Refugee Act of 2006.
48. Applying the standards of the 2021 Act to review a decision made under the previous law would be an impermissible retrospective application of the law.
49. Concerning the second issue, the fairness of the process and the evidential basis for the decision, the Court finds further infirmities.
50. The principle that the burden of proof in revocation proceedings lies with the authorities is well-established.

ORIGINAL

51. The decision to revoke status must be based on **"cogent and verifiable evidence."** The primary evidence against the Appellant was an indictment from Rwanda, the very state from which he sought protection.

52. While an indictment can trigger an inquiry, it cannot, without more, constitute conclusive proof of guilt or misrepresentation.

53. The Board was obligated to independently and critically assess the evidence, bearing in mind the potential for motivated allegations.

54. The Board's heavy reliance on this indictment, alongside "country of origin information" and witness testimonies from other proceedings that were not adequately disclosed or subjected to rigorous challenge, violated the Appellant's right to a fair hearing.

55. Article 50(2)(k) of the Constitution guarantees every accused person the right to challenge evidence. The use of undisclosed or insufficiently tested material to arrive at a finding of misrepresentation and complicity in grave crimes was procedurally unfair and rendered the decision unsustainable.

56. Furthermore, several of the Board's findings appear to be based on conjecture rather than evidence.

57. For instance, the inference that the Appellant left the Ruhengeri Court of Appeal because "he knew that an attack was about to be carried out," or that his survival as a "moderate Hutu" was inherently suspicious, are speculative conclusions not grounded in any evidence presented.

58. A tribunal acting judicially must not engage in speculation. Similarly, holding the Appellant responsible for the actions of his colleague, Dismas Nzanana, without any evidence of the Appellant's knowledge or authorization, was an error.

ORIGINAL

59. The decision to withdraw status based on misrepresentation must be founded on clear and specific inconsistencies, not on general assumptions or circumstantial evidence that is not convincing.

60. On the third issue regarding the composition of the Board, a most serious procedural irregularity is apparent. The record indicates that the hearing before the Refugee Appeal Board was conducted by a panel of three members.

61. However, the final decision was signed by five members, including two who were not part of the hearing panel.

62. The essence of a fair hearing under Articles 47 and 50 of the Constitution is that the person who hears the matter must decide it.

63. A party is entitled to present their case before the very minds that will adjudicate upon their rights.

64. The decision in **Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR** underscored that the constitutional right to a fair hearing includes the right to be heard by an impartial tribunal established by law.

65. For two members who did not hear the viva voce evidence or observe the Appellant's demeanour to participate in the determination of the appeal was a gross violation of the Appellant's right to a fair hearing and vitiates the entire decision of the Board.

66. In conclusion, the Court finds that the decision of the Refugee Appeal Board dated 31st May 2021 is fundamentally flawed.

67. It was premised on a misapplication of the governing law, it relied on evidence that was not properly tested, it contained findings based on speculation, and it was rendered through a procedurally

ORIGINAL

improper panel composition that breached the Appellant's constitutional rights.

68. Consequently, the appeal is allowed. The decision of the Refugee Appeal Board affirming the withdrawal of the Appellant's refugee status is hereby set aside.

69. Each party shall bear its own costs.

70. It is so ordered.

DELIVERED, DATED and **SIGNED** at **NAIROB**I this **8th** day of **October, 2025.**

A. ONGERI

JUDGE

Judgment virtually delivered in the presence of:

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